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No. 08-11

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The
Supreme Court of the United States

GABRIEL G. ATAMIAN, MD, MSEE, JD,

Petitioner,

v.

WILLIAM M. RICH, MD,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of Calfornia, Fifth Appellate District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Whether the Court has jurisdiction to exercise appellate review of a state court decision which does not implicate any question of Federal law, treaty or statute of the United States?

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II. COUNTERSTATEMENT OF JURISDICTION

As detailed *infra,* William M. Rich, M.D. (hereinafter "Respondent") bases his Opposition on, among other things, this Court's lack of jurisdiction over the issues presented by Gabriel G. Atamian (hereinafter "Petitioner"). Contrary to Petitioner's argument, 28 U.S.C. §1257(a) is wholly inapplicable in this context, nor are there any alternative basis for this Court to grant Petitioner's Writ.

III. COUNTERSTATEMENT OF CASE

Petitioner advances this Petition for Writ of Certiorari without jurisdictional basis. Before approaching this Court, Petitioner filed a multitude of appeals and motions with every inferior court that could conceivably exercise jurisdiction over Respondent. Simply put, this is the only remaining court from which Petitioner's claims have not been summarily dismissed.

Origins of the Petition at Issue

Petitioner seeks reversal of the denial of his Petition for Review to the California Supreme Court, which effectively upheld the dismissal of his appeal by the California Fifth District Court of Appeals. The judgment of dismissal originated in the Fresno County Superior Court, case number 05CECG03527, entitled *Margaret Berberian v. William M. Rich, M.D.* In essence, Petitioner asks this Court to undo the uniformity of decisions in favor of Respondent,

spanning nearly three years of litigation. This litigation involves a straightforward dismissal in a California medical malpracti e action. It concerns no determination of any United States Court of Appeals, questions of federal law, or matter of constitutional law.

Specifically, the background allegations commence in January 2002, when Margaret Berberian ("Ms. Berberian") underwent a hysterectomy performed by Respondent, an obstetrician/gynecologist. In November of 2005, Ms. Berberian (*in propria persona*) sued Respondent for alleged medical malpractice, essentially claiming that Respondent had failed to timely diagnose uterine cancer. Ms. Berberian's complaint was plagued with defects.

In January 2006, Ms. Berberian passed away. (Petitioner's Appendix (hereinafter "P. App.") 23.) On February 15, 2006, Philip Berberian, the decedent's nephew, and Petitioner, Ms. Berberian's brother, thereafter filed an "motion to amend complaint for the first time" seeking to add only their names to the caption and leaving the substance of the complaint untouched – including statements to the effect that Ms. Berberian was still alive. (Respondent's Appendix (hereinafter "Resp. App.") 1, Exhibit "A.") Over the next several months, Petitioner was advised to properly amend this Complaint. The Superior Court afforded him substantial time to do so. The trial judge also continued multiple hearings and provided Petitioner ample time to try and secure counsel to assist him in this matter.

Despite these efforts, Petitioner refused to correct the deficiencies in the pleadings, failed to appear at two ordered conferences, and would not take appropriate steps to prosecute the case. Nearly a year after its filing, the negligence complaint was dismissed with prejudice. (P. App. 19-20.)

Petitioner appealed the dismissal to the Fifth District Court of Appeal for the State of California. Petitioner's appeal was dismissed for lack of standing – he was not the real party in interest to the trial court action. (P. App. 15-16.) Petitioner then sought a Petition for Review to the Supreme Court of California. That petition was denied. (Resp. App. 3, Exhibit "B.") Having encountered no success through state court processes, Petitioner has now shifted his focus toward this Writ of Certiorari.

IV. SUMMARY OF ARGUMENT

Petitioner asserts that the Court has jurisdiction to hear this matter. Yet, the Petition is devoid of any federal question, relationship to any decision or determination of any federal court, or any other appropriate basis for a Petition for Writ of Certiorari. All of Petitioner's substantive arguments – which involve application of California state law – have been made previously and were dismissed as substantively meritless by the California courts. Petitioner's argument is nothing more than an attempt to re-litigate claims properly disposed of under a state

law analysis. Therefore, the present Petition should be denied.

V. ARGUMENT

A. This Court Lacks Jurisdiction Over the Judgment at Issue

1. Petitioner Erroneously Asserts That 28 U.S.C. §1257 Grants This Court Jurisdiction

28 U.S.C. §1257 is wholly inapplicable to the present Petition. Section 1257, in pertinent part, expressly limits the Supreme Court's jurisdiction to matters where: "the *validity of a treaty or statute of the United States* is drawn in question or where the *validity of a statute of any state* is drawn in question on the ground of its being *repugnant to the Constitution*, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." (28 U.S.C. §1257(a) (emphasis added).)

"Drawn in question" means that the issue must either be raised or "squarely considered and resolved" by the state court, or actually decided by the appropriate Court, or both. (*Illinois v. Gates*, 462 U.S. 213, 218 n.1, 103 S.Ct. 2317, 76 L. Ed. 2d 527 (1983).) Further, "specially set up or claimed" requires not only that the issue be brought up but that it be brought up

expressly and at the right time. (*Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308, 23 S.Ct. 375, 47 L. Ed. 480 (1903) "[T]he right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.") Indeed, in cases where the petitioner failed to raise the argument of a potential federal issue in the state court, the matter was deemed waived for purposes of certiorari review. (*Webb v. Webb*, 451 U.S. 493, 495, 101 S.Ct. 1889, 68 L. Ed. 2d 392 (1981).)

Here, the present Petition implicates no rights arising from federal law or involving a federal question. Moreover, because Petitioner did not raise any federal question or issue of constitutional law in the state courts, these arguments and contentions are deemed waived and cannot be raised for the first time on Petition. Finally, any argument that a constitutional issue (as to the substantive state law applied in the lower courts) was "impliedly" raised or otherwise was set at issue in the state court proceedings is also ill fated because a state's statute is not sufficiently "drawn into question" if not explicitly and timely challenged by the petitioner. (*Charleston Fed. Sav. & Loan Ass'n v. Alderson*, 324 U.S. 182, 185, 65 S.Ct. 624, 89 L. Ed. 857 (1945).)

Therefore, the Court has no jurisdiction to hear the present Petition as the writ is not authorized under 28 U.S.C. §1257. The Petition at issue should be denied.

2. The Underlying Matter Was Decided Based Exclusively on California Law

It is well settled that where the Petition arises from a state court judgment, which itself is based on a ground other than a law raising a federal question, the United States Supreme Court will not take jurisdiction. The foregoing rule applies even if the position of the state court is an unsound one. (*De Saussure v. Gaillard*, 127 U.S. 216, 234, 32 L. Ed. 125, 8 S.Ct. 1053 (1888); *Walter A. Wood Mowing & Reaping Machine Co. v. Skinner*, 139 U.S. 293, 295, 11 S.Ct. 528, 35 L. Ed. 193 (1891), cited in dissenting opinion in *Michigan v. Long,* 463 U.S. 1032, 1067, 103 S.Ct. 3469, 77 L. Ed. 2d 1201 (1983).)

Petitioner bases this Petition simply on his dissatisfaction with the rulings handed down against him in the California courts due to: (1) His lack of standing to sue; (2) Failure to comply with court orders; and (3) Failure to properly prosecute the underlying litigation. All of the foregoing determinations of the California courts were made independent of any Federal question. As such, no grounds for the Court's exercise of jurisdiction exist.[1]

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[1] Even if Petitioner could somehow demonstrate that the California courts incorrectly applied California law (which, we submit, he cannot), the Court should still deny review as the foregoing is not a substitute for a lack of jurisdiction.

B. The Court Should Decline to Exercise Discretionary Review

1. Even if the Court Has Jurisdiction Over the Underlying Matter, It Should Refuse Certiorari Review

Certiorari review under Section 1257 of title 28 is *discretionary*. (28 U.S.C. §1257, (emphasis added).) Supreme Court Rule 10 provides some illustrations of where said discretionary review should be exercised and contains the admonition that certiorari review will be granted only for "compelling reasons." Specifically, Rule 10 sets forth three categories of issues which may present a "compelling reason" for granting discretionary review: (a) To deal with a *decision rendered by one United States Court of Appeals* that is in conflict with another United States Court of Appeal on an important matter; (b) When a state court of last resort has decided an *important federal question* that conflicts with the decision of another state court of last resort or United Status Court of Appeals; (c) Where a state court or a United States Court of Appeals decided an *important issue of federal law* that has not been and should be settled by the Supreme Court, or that conflicts with the prior holdings of the same. (Supreme Court, Rule 10 (emphasis added).)

The key theme tying together each of these three categories is a petition's relationship to a federal law or an act of a federal judiciary. In contrast, all of Petitioner's arguments are based on California law. Specifically, he complains that he is a "fiduciary"

under the California Probate Code and characterizes that as a key "question of law, wrongly decided."

The present petition is thus devoid of any relationship to a decision of any federal court, determination or application of any federal law, or in any way connected to a dispute between any two state's courts of last resort. The present Petition, along with the appeals which preceded it, is without merit and constitutes an unfortunate waste of judicial and party resources. For these reasons as well, the Petition must be denied.

C. The California Courts Correctly Decided All Issues Before Them

The analysis below is offered based on the procedural history of the underlying action, beginning with judgment entered against Ms. Berberian in the Fresno County Superior Court (the trial court), that served as the catalyst for this Petition. The analysis concludes with the denial of Petitioner's petition for review to the Supreme Court of California.

1. The Dismissal of Petitioner's Claims at the Trial Court Level Was Appropriate

As noted, *supra*, this action stems from a Complaint based on the alleged malpractice of the Respondent (the "Underlying Action"), originally filed by the deceased, Ms. Berberian, in November of 2005. At the time of her death, Ms. Berberian was unrepresented by counsel, was the only named plaintiff in the

Underlying Action, and a personal representative or successor in interest had not been substituted into the case. On February 16, 2006, Phillip Berberian ("Phillip") (the decedent's son) and Petitioner (the decedent's brother) filed a "motion to amend for the first time"; the only proposed substantive change being the substitution of Phillip and Petitioner as Plaintiffs in the caption of the Complaint.[2] (Resp. App. 1, Exhibit "A.")

At a May 2, 2006 hearing on the matter, the trial judge, the Honorable Judge Alan A. Simpson advised Phillip and Petitioner of the substantive and procedural deficiencies of the proposed amendment and advised them to seek counsel. Petitioner thereafter failed to rectify the deficiencies in the pleadings or obtain counsel to assist him. In the interests of justice and to ensure the matter was resolved on the merits, the trial court granted Phillip and Petitioner (to which Respondent consented), two sixty-day extensions to allow them to address its various concerns.

In response to these extensions, Phillip represented to the trial court, on the record, that if he failed to secure counsel within said sixty days, that he and Petitioner would voluntarily dismiss the action. (Resp. App. 3, Exhibit "B.") Petitioner failed to obtain counsel within that time frame, did not properly amend

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[2] The amended complaint included references to Ms. Berberian still being alive, as well as numerous other deficiencies and errors.

the pleadings, but nonetheless clung on to this litigation. To make matters worse, Petitioner failed to appear at two consecutive court-ordered Status Conferences.[3] Due to Petitioner's failure to comply with the rules of civil procedure and the California Rules of Court in properly prosecuting his claims, Ms. Berberian's complaint was dismissed with prejudice on August 2, 2006 – nearly one year after the initial filing of the action.[4] (P. App. 19-20.)

2. Because Petitioner Lacked Standing, the Dismissal of His Appeal Was Appropriate

After the action was dismissed by the trial court, Petitioner filed his appeal in the Fifth District Court of Appeal on September 7, 2006. Petitioner again failed to comply with the Rules of Court, specifically California Rule of Court 8.220(a)(1), by failing to file an Opening Brief and Appendix. Yet again, Petitioner received an admonishment from the California appellate court on February 22, 2007, this time being

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[3] Status Conferences are set in the Fresno County Superior Court system to issue trial dates and generally discuss the status of cases.

[4] Petitioner advances several allegations of judicial misconduct and "aberrations" which purportedly involve the presiding judge, the Honorable Alan A. Simpson, and Respondent's counsel, Jerry Casheros. These contentions find no support in the record. While the foregoing is not dispositive as to the present Petition, Supreme Court Rule 15 commands Respondent to identify perceived misstatements of fact or law.

advised that if he did not file the required papers within 15 days of said notice, his appeal would be dismissed. (Resp. App. 8, Exhibit "C.") Petitioner eventually filed his Opening Brief and Appendix on June 25, 2007.

Ultimately, the Fifth District Court of Appeal rejected Petitioner's appeal based on a proper determination of standing under California law. In California, only an aggrieved party may appeal a case. (Cal. Code of Civ. Proc. §902.) A party is aggrieved only if his or her rights or interests are injuriously affected by the judgment. (*County of Alameda v. Carleson*, 5 Cal. 3d 730, 737, 488 P.2d 953 (1971).) Generally, only a party of record may appeal the lower court's judgment. (*Id.*) Where the appellants are not named as parties to the action, nor did they take any appropriate steps to become parties to the record, it is proper to dismiss the appeal. (*Eggert v. Pacific States Sav. & Loan Co.*, 20 Cal. 2d 199, 201, 124 P.2d 815 (1942).) In contexts such as these where the plaintiff is no longer able to prosecute her claims, the decedent's personal representative or the decedent's successor in interest may continue in their stead. (Cal. Code of Civ. Proc. §377.31.) However, a person has no power as a personal representative until he or she is appointed. (Cal. Probate Code §8400(a).) A person is eligible for appointment as a personal representative if the person is named as executor in the decedent's will, or, if the decedent dies intestate, the Court appoints them as a personal representative. (Cal. Probate Code §§8420, 8460.)

The Court of Appeal determined that Petitioner was not the personal representative of Ms. Berberian, as he was never appointed as such. (P. App. 14.) Nor was Petitioner ever properly joined before the lower court action as a party. (P. App. 11.) Accordingly, Petitioner was not an "aggrieved party," as defined under California law. This negated his standing to bring an appeal. Based on this lack of standing, the remainder of Petitioner's arguments were moot.[5]

As detailed above in sections (a) and (b), Petitioner enjoyed significant accommodation in each step of the underlying action. Nonetheless, Petitioner failed to cure the defects in his pleadings, would not follow court orders, and, finally, declined to attend two court-mandated hearings. The warranted dismissals at the trial court and Court of Appeal levels were based solely on the application and construction of California law and did not expressly or impliedly involve any federal question.

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[5] However, even had the Court of Appeal found Petitioner to have standing, the trial court's substantive bases for the dismissal would have supplied more than sufficient basis for affirmance on appeal.

VI. CONCLUSION

The decision Petitioner asks this Court to review is based exclusively on California law, and without the involvement of any federal court or issue of federal law. The underlying action was correctly and fairly decided and should not be disturbed. Based on the foregoing, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

KURT F. VOTE*
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ROGER S. BONAKDAR
MCCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP
5 River Park Place East
Fresno, CA 93720
(559) 433-1300

Attorneys for Respondent William M. Rich, MD

**Counsel of Record*

RESPONDENT'S APPENDIX EXHIBIT A

Philip Beberian, Administrator
of the Estate of Margaret Beberian,
Deceased; and, Gabriel G. Atamian,
MD,MSEE,JD, Brother of Margaret Beberian
Deceased
1387 W. Sierra Avenue
Fresno, California 93711
(559) 440-1064
In Pro Per

**IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO**

Margaret Beberian, Plaintiff William M. Rich, MD, Defendant.	**MOTION TO AMEND COMPLAINT FOR THE FIRST TIME.** (Filed Apr. 28, 2006) Compklaint [sic] Filed: November 10, 2005 Trial Date: Unassigned Date: May 2, 2006 Time: 3:30 pm Dept: 72 Judge: Honorable Alan Simpson

Comes Now Plaintiffs, by themselves, and moves this Honorable Court, to amend for the First Time the Complaint, and in support of their motion state:

1. Plaintiffs respectfully request permission to file their first amended complaint in the form attached to this motion as Exhibit A.

2. The amendment consist only by changing the caption by adding two plaintiffs and deleting plaintiff's margaret because she was deceased on January 16, 2006.

3. Needless to say, that with the above change, the action will be a wrongfull [sic] death.

4. Permitting Plaintiffs to amend their Complaint would be fair and in no way prejudicial to defendant.

WHEREFORE, Plaintiffs pray that the motion be Granted.

Respectfully submitted,

Dated: 4/28/06

/s/ Philip Beberian
Philip Beberian,
Plaintiff Pro se

RESPONDENT'S APPENDIX EXHIBIT B

Case No. 05 CE CG 03527 No.

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

CENTRAL DIVISION

Before the Honorable Alan Simpson, Judge

Department 72

MARGARET BEBERIAN, Plaintiff/Appellant, vs. WILLIAM RICH, M.D., Defendant/Respondent.	) REPORTER'S TRANSCRIPT ON APPEAL (Filed Jan. 3, 2007) VOLUME I PAGES 1-50 MAY 2, 2006 JUNE 29, 2006 JULY 11, 2006

–oOo–

APPEARANCES:

FOR THE PLAINTIFF AND APPELLANT: GABRIEL G. ATAMIAN, MD, MSEE, JD
1387 West Sierra Avenue
Fresno, California 93711

FOR THE DEFENDANT AND RESPONDENT: McCORMICK, BARSTOW, SHEPPARD WAYTE & CARRUTH LLP
BY: JERRY D. CASHEROS
5 River Park Place East
Fresno, California 93720

* * *

Reported by:
SUZANNE M. McKENNON, CSR, RPR, CRR
Certificate No. 9713

[12] trying to explain this to you. I've tried to explain it about two or three different ways, kind of all around the same concept. I think you're understanding that. But this isn't working. And so all I'm going to do today is continue this for a short – fairly short time.

You see, by doing that, their – their client has a right also to have a resolution to this. Whether – whether he did something right or wrong or provided treatment that was below the standard of care or not, he – he has a right to have this moved along, too, and not just proceed at your pace. And so I've got to consider that, too.

And so you said time. How much time do you – do you need, do you think?

MR. BERBERIAN: Can you give us 60 days?

THE COURT: Well, can you tell me –

MR. BERBERIAN: Yes.

THE COURT: I don't want to know what any attorneys have told you or your brother. Can you tell me what you think is going to happen in 60 days or what the plan is that's going to happen over the next 60 days that's going to be different than the last 60 days?

MR. BERBERIAN: Well, you want me to tell you now?

THE COURT: Yes.

MR. BERBERIAN: We found some attorneys that were waiting for the records, and I had to subpoena all the records from the subpoena service.

[13] THE COURT: Okay. Did you get the records?

MR. BERBERIAN: I got the records.

THE COURT: Did you get the records to the attorney?

MR. BERBERIAN: No, no. They just came to me today.

THE COURT: Okay.

MR. BERBERIAN: The box is bigger than – it's this much of records (indicating).

THE COURT: A foot and a half high?

MR. BERBERIAN: More.

THE COURT: I understand how that can be.

MR. BERBERIAN: Anyway, they just came. Now, they want the records, and they're going to look through everything. And then they're going to make their thing. But if we can't do this, we'll gladly just dismiss the case after the 60 days. We'll just drop the

whole thing. And I can put that on my – on my – on my word right now. We'll let it go. If we can't find a lawyer in 60 days, we're going to let this – we're going to dismiss it ourselves.

THE COURT: I see. All right.

Did you wish to be heard further, Mr. Casheros?

MR. CASHEROS: No.

THE COURT: Is there a date that would be convenient for both of you in approximately 60 days or so?

MR. CASHEROS: Whatever works for the Court and Mr. Berberian is fine.

THE COURT: Well, how about – how about Tuesday,

* * *

[40] STATE OF CALIFORNIA)
) ss.
COUNTY OF FRESNO)

I, SUZANNE M. McKENNON, Certified Shorthand Reporter, do hereby certify that the foregoing pages, numbered 1 to 40, inclusive, comprise a full, true and correct transcript of my shorthand notes, and a full, true and correct statement of the proceedings held at the time and place heretofore stated.

DATED: Fresno, California
January 3, 2007

/s/ Suzanne M. McKennon
SUZANNE M. McKENNON,
CSR, RPR, CRR
CERTIFICATE NO. 9713

* * *

RESPONDENT'S APPENDIX EXHIBIT C

STATE OF CALIFORNIA
Court of Appeal
FIFTH APPELLATE DISTRICT

2525 CAPITOL STREET
FRESNO, CALIFORNIA 93721-2227

[SEAL]

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February 22, 2007

Gabriel G. Atamian
1387 W. Sierra Ave.
Fresno, CA 93711

Re: Atamian v. Rich
F051240
Fresno County No. 05CECG03527

Dear Counsel:

You are hereby notified that if appellant's appendix and opening brief are not on file or good cause for relief shown within 15 days after the date of this notice, the appeal herein will be dismissed. (Rule 8.220(a)(1), California Rules of Court.)

Very truly yours,

/s/ Leisa V. Biggers
LEISA V. BIGGERS
Clerk/Administrator

cc: All counsel